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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-408

MARIE and DONALD DUCHARME,
Petitioners,

versus

MERRILL-NATIONAL LABORATORIES, and
United States of America,
Respondents.

PETITION ON BEHALF OF MARIE and DONALD DUCHARME FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

MARIE and DONALD DUCHARME,
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versus

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Respondents.

PETITION ON BEHALF OF MARIE and DONALD DUCHARME FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

This is an application for a writ of certiorari to the United States Court of Appeals, Fifth Circuit, as to its per curiam decision rendered on June 14, 1978, affirming a decision of the United States District Court, Western District of Louisiana, and adopting the Dis-

trict Court's reasons for its decision, whereby petitioners' suit at common law in excess of TWO MILLION FIVE HUNDRED THOUSAND AND NO/100 ($2,500,000.00) DOLLARS was dismissed. The dismissal of petitioners' lawsuit is based upon the court's constitutional assessment of the Swine Flu Act (Public Law 94-380 (42 U.S.C. 247)), holding essentially that petitioners' remedy is of an administrative nature only and their Seventh Amendment right to trial by jury has constitutionally been taken from them by the Swine Flu Act. The decision of the appellate court (574 F.2d 1307 (1978)), incorporating the unreported decision of the District Court (U.S.D.C., Western District of La., Docket No. 77-3488) is reproduced in the Appendix at Pages 1a-9a.

JURISDICTION

This application for a writ of certiorari invokes the jurisdiction of the court pursuant to 28 U.S.C.A. 1254; 28 U.S.C.A. 2101 and Supreme Court Rules 19, et seq.

QUESTIONS PRESENTED

Three essential questions are presented:

(1) Whether or not the Swine Flu Act denies petitioners of their property without due process in violation of the Fifth Amendment;

(2) Whether or not it denies petitioners of trial by jury in violation of the Seventh Amendment; and,

(3) Whether or not it denies petitioners of equal protection in violation of the Fifth Amendment.

CONCISE STATEMENT OF THE CASE

This is a suit at common law filed in the District Court where the value in controversy exceeds Twenty Dollars. It is a suit against Merrill-National Laboratories in the sum of TWO MILLION FIVE HUNDRED THOUSAND AND NO/100 ($2,500,000.00) DOLLARS on behalf of petitioner, Marie Ducharme, who suffered partial paralysis as a result of the administration of a swine flu vaccine, and for a claim of ONE HUNDRED FOUR THOUSAND AND NO/100 ($104,000.00) DOLLARS on behalf of her husband, petitioner Donald Ducharme. The claims arise under the laws of the State of Louisiana based upon the negligence and wrongful conduct of the manufacturer of the swine flu vaccine.

Invoking the provisions of the National Swine Flu Immunization Program of 1976 (Public Law 94-380, August 12, 1976), the United States seeks to substitute itself as defendant in lieu of Merrill-National Laboratories and upon the assumption of that capacity, to dismiss petitioners' lawsuit. The dismissal motion is predicated upon the claim that the United States "is liable in accordance with the provisions of the Federal Tort Claims Act" (28 U.S.C. 1346(b), 2671, et seq.) and pursuant to that act petitioners are limited to an administrative remedy only, and upon denial of any remedy, to an appeal or an action before the Federal Court for a trial without jury. The position states further that the requisite administrative process raises a jurisdictional defect and therefore, forasmuch as petitioners have not pursued such an administrative remedy, their lawsuit must be dismissed.

Petitioners filed opposition to the government's motion. The opposition is rooted in the following constitutional trilogy: (a) The Swine Flu Act (Public Law 94-380 (42 U.S.C. 247)), upon which the government relies for its motion is constitutionally void because it denies petitioners of their property without due process, in violation of the Fifth Amendment; (b) it denies petitioners of trial by jury in violation of the Seventh Amendment; and (c) it denies petitioners of equal protection in violation of the Fifth Amendment.

After hearing on these motions, the District Court granted the Government's motions to be substituted as sole defendant and to dismiss petitioners' lawsuit. On appeal, the Fifth Circuit, in a per curiam decision, affirmed the lower court and adopted the District Court's reasons for judgment. (574 F.2d 1307)

SUMMARY OF ARGUMENT

(a) The Swine Flu Act Denies Petitioners of Their Property Without Due Process in Violation of the Fifth Amendment

The Swine Flu Act substitutes the United States Government for a *private* tort-feasor as the party transitorily responsible in damages for wrongful injury to a *private* citizen caused by the tort-feasor's negligence or imprudence arising out of the administration of Swine Flu vaccine under the Swine Flu program. The Act does not create a cause of action in favor of an injured person. It merely acknowledges the existence of any cause of action which the injured person may have "under the law of the place" where

the tort occurred, "including ngeligence, strict liability and tort, and breach of warranty" (42 U.S.C. 247(b)(k)(2)(B)(2)(A)(i)). This substitution mechanism includes manufacturers of the Swine Flu vaccine, as beneficiaries who are neither employees, nor representatives nor agents of the United States Government.

Petitioners' claim is a suit at common law, a cause of action created by the laws of Louisiana[1] against a private person i.e., Merrill-National Laboratories. This cause of action is protected by the Fifth Amendment and may be taken from petitioners only in return for "the exact equivalent". *Richmond Screw Anchor Co. v. United States,* 48 S.Ct. 194. This is true because the substitution of the United States Government for the private person, i.e., Merrill-National Laboratories "is not a case of a mere declared immunity of the Government from liability for its own torts. It is an attempt to take away from a private citizen his lawful claim for damage to his property by another private person, which but for this act he would have against the private wrongdoer." *Richmond Screw Anchor Co.,* supra, at P. 197.

Petitioners' right to trial by jury of its claim against Merrill-National Laboratories is sanctioned by Louisiana law (Article 1731-1814 of the Code of Civil Procedure of Louisiana) and secured by the Seventh Amendment. As such petitioners' right to trial by jury forms an integral part of their cause of action for wrongful injury. The "exact equivalent" of

---

1 Louisiana Civil Code, Article 2315 reads: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

petitioners' claim against Merrill-National Laboratories includes petitioners' right to trial by jury. As such, petitioners' jury trial right may not be denied without offending the proscription of the Fifth Amendment.

(b) The Swine Flu Act Denies Petitioners of Trial By Jury in Violation of the Seventh Amendment

The nature of the issue to be tried in connection with petitioners' claim is that traditionally involved in a suit at common law. The nature of the issue rather than the character of the overall action determines the applicability of the Seventh Amendment. *Ross v. Bernard*, 90 S.Ct. 733, 738. Thus, petitioners' right to trial by jury of their claim is therefore secured by the Seventh Amendment. "Congress has no power * * * to undercut the amendment's guarantees of personal equality and freedom from discrimination * * * or to undermine those protections of the Bill of Rights * * *", *Oregon v. Mitchell*, 91 S.Ct. 260, 267. Congress, by the enactment of the Swine Flu Act, in remitting petitioners, and those similarly situated, to the administrative procedures established by the Federal Tort Claims Act, has done precisely that which *Oregon* says is proscribed, i.e., it has denied petitioners of their Seventh Amendment right to jury trial. Defendants' motions, therefore, were improperly sustained and the judgment of the lower court must be reversed.

(c) The Swine Flu Act Denies Equal Protection And Thus Violates the Due Process Concept of the Fifth Amendment

The Swine Flu Act invidiously discriminates against petitioners as claimants and in favor of Merrill-National Laboratories and all other "program participants" as to the Seventh Amendment right to trial by jury. Under Section 247(b)(C)(7), should petitioners obtain judgment against the United States or should their claims be settled with the United States, based upon the negligence of Merrill-National Laboratories, the United States would have the right to file an action against this drug manufacturer in the district court of its residence to recover from it the amount of any payment that it would make to petitioners. In such an action, Merrill-National Laboratories would have the unquestioned and unconditional right to trial by jury. *Hepner v. United States*, 29 S.Ct. 474; *United States v. Regan*, 34 S.Ct. 213. Thus, under the terms of the Swine Flu Act, the wrongdoer, whose tortious action injured petitioners, is granted trial by jury of the very issues involved in that tortious action. On the other hand petitioners, the victims of the wrongdoer's actions, are denied trial by jury of all relevant issues of such tortious action. This disparity of constitutional liberty prevails notwithstanding that there exists no difference which bears a reasonable and just relation to the Swine Flu Act in respect to which this discrimination exists.

Thus, the Swine Flu Act instances a congressional effort to "legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute", and as such is constitutionally proscribed. *Reed v. Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253. Such a classification is invalid under the equal

protection clause of the Fourteenth Amendment and as such it is also inconsistent with the due process requirement of the Fifth Amendment. *Richardson v. Belcher*, 404 U.S. 78, 92 S.Ct. 254; *Johnson v. Robison*, 94 S.Ct. 1160. The Swine Flu Act, therefore, denies petitioners of due process secured to them by the Fifth Amendment.

ARGUMENT

(a) The Swine Flu Act Denies Petitioners of Their Property Without Due Process in Violation of the Fifth Amendment

Petitioners' cause of action against Merrill-National Laboratories is a common law tort action created by the State of Louisiana under the provisions of Article 2315 of the Louisiana Civil Code. The claims asserted include negligence, strict liability and breach of warranty. The Swine Flu Act under scrutiny does not purport to create either the cause of action asserted or a new cause of action unknown to the common law. The cause of action asserted by petitioners and created by the laws of Louisiana is well known to the common law and is that cause of action contemplated by the Seventh Amendment. Their cause of action involves a wholly *private tort* between *private* parties. While the Swine Flu Act does not create the cause of action asserted, by its terms it (a) denies petitioners of the right to assert their cause of action against Merrill-National Laboratories and (b) denies petitioners of their Seventh Amendment right to jury trial of their common law private tort action. A brief analysis of the Swine Flu Act is helpful.

First the Act creates "program participants". Among the "program participants" is a manufacturer of swine flu vaccine such as Merrill-National Laboratories (42 U.S.C. 247(b)(k)(2)(B)). Then under the declared purpose to protect "program participants" against "liability for OTHER THAN THEIR OWN NEGLIGENCE to persons alleging personal injury or death arising out of the administration of such vaccine" (k)(1)(A)(i), Section (B)(2)(A) provides:

> "The United States shall be liable with respect to claims submitted after September 30, 1976, for personal injury or death arising out of the administration of swine flu vaccine under the swine flu program and based upon the act or omission of a program participant in the same manner and to the same extent as the United States would be liable in any other action brought against it under Section 1346(b) and Chapter 171, except that —
>
> "(i) the liability of the United States arising out of the act or omission of a program participant may be based on *any theory of liability* that *would govern* an action *against such program participant* under the *law of the place* where the act or omission occurred, including negligence, strict liability and tort, and breach of warranty.
>
> * * *
>
> (B)(2)(A)(B)(3) "The remedy against the United States prescribed by Paragraph (2) of this subsection for personal injury or death arising out of the administration of the swine

> flu vaccine under the swine flu program shall be exclusive of any other civil action or proceeding for such personal injury or death against any employee of the government * * * or program participant whose act or omission gave rise to the claim."

Thus, the Act does not create a new cause of action. It merely acknowledges the existence of any cause of action which a flu vaccine victim may have under the law of the place where the act or omission causing injury occurs. In plaintiffs' case, the Act recognizes the "theory of liability" or the cause of action created by Article 2315 of the Louisiana Civil Code as interpreted by the Courts of Louisiana. While recognizing plaintiffs' cause of action under Louisiana law, the Act takes away from petitioners their lawful claim for damage against a private person, i.e., Merrill-National Laboratories, who inflicted the damage and who, under Louisiana law, is liable to petitioners for such damage. The Act then interposes the United States as the party liable under the cause of action created by the laws of Louisiana against Merrill-National Laboratories. This provision of the Act does not instance a case of a mere declared immunity of the government from liability for its own torts. The interposition of the United States as party defendant also instances the United States' voluntary assumption of the liability of Merrill-National Laboratories for the latter's torts as defined and secured by the laws of Louisiana. It is obvious that the Congress, in so providing in this Act, was attempting to grant to petitioners "the exact equivalent" of what it was taking away from them, in compliance with the constitutional principle, applicable in such a situation,

and established by this Court in *Richmond Screw Anchor Company v. United States*, 48 S.Ct. 194. But this Act is faulted with a significant shortfall in the attempt to grant petitioners "the exact equivalent" of the remedy which they had against Merrill-National Laboratories for the latter's tort. The Act denies petitioners of trial by jury of their common law tort action. This result is accomplished by the Act relegating plaintiffs to the administrative procedures established by the "Federal Tort Claims Act" Section 1346(b). In part pertinent the Tort Claims Act mentioned establishes the following procedure:

> "An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death (arising out of the administration of swine flu vaccine under the swine flu program and based upon the act or omission of a program participant), unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for the purpose of this section."

28 U.S.C., Section 2675 (as amended 1966). The parenthetical phrase substitutes the language of the Swine Flu Act (42 U.S.C. Section 247(b)(k)(2)(A)), for

that of the Tort Claims Act: "caused by the negligent or wrongful act of omission of any employee of the Government while acting within the scope of his office or employment." Following denial of the claim by the appropriate administrative agency the injured person can initiate an action against the United States in the district court:

> "Subject to the provisions of Chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for . . . personal injury or death (arising out of the administration of swine flu vaccine under the swine flu program and based upon the act or omission of a program participant), if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C., Section 1346(b). However:

> "Any action against the United States under section 1346 shall be tried by the court *without a jury.*"

28 U.S.C., Section 2402 (emphasis added).

Thus, under the express provisions of the Swine Flu Act, the United States is substituted for the named defendant in petitioners' lawsuit and petitioners are denied of trial by jury. But jury trial is granted to petitioners by the laws of Louisiana and secured to

them by the Seventh Amendment. As such the right to jury trial forms an integral part of their claim or remedy against Merrill-National Laboratories. This jury trial right is an invaluable property right. As such it may not be denied without offending the proscription of the Fifth Amendment.

The controversy presented by petitioners' complaint involves the claim of private citizens against another private citizen, sustained and created by the laws of Louisiana. Petitioners' claim is not a case involving the conduct of an agent, employee or representative of the United States. This is not a case potentially involving the vicarious liability of the United States. This is a case involving a *private* claim against a *private* citizen for a *private* wrong against a *private* citizen. The private nature of the controversy is an indigenous quality uncommon to any other case involving the question of sovereign immunity of the United States. The principle established by this court in *Richmond Screw* is to the effect that in such a private controversy Congress is without constitutional authority to take away such a claim without a quid pro quo or granting "the exact equivalent" to the private citizen from whom such a claim is sought to be taken.

Because *Richmond Screw* is most instructive in the analysis of the constitutionality of the Swine Flu Act, a detailed scrutiny of it is imperative. *Richmond Screw* involved a claim for patent infringement under 35 U.S.C.A. 68 as amended July 1, 1918. It was a patent infringement claim against the United States. The patent in controversy was granted by the United States on

May 29, 1917 to Melchiar Lenke and assigned by Lenke to Thomas E. Cappel on September 29, 1920, who in turn on March 7, 1921, assigned it to the plaintiff company, Richmond Screw Anchor Company.

The 1918 Amendment provided for the substitution of the United States as party defendant for an infringing contractor in the same manner as is accomplished by the Swine Flu Act. The pertinent portion of the 1918 Amendment in *Richmond Screw* reads as follows:

> "* * * that whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and *entire* compensation for such use and manufacture."

As the court observed in the course of the opinion, this Amendment "effects an assumption of liability by the government." The 1910 Act as it existed before the 1918 amendment involved in *Richmond Screw* had been interpreted to exclude all "unliquidated claims against the Government arising prior to the time" the claimant became owner of the patent by assignment. *Brothers v. United States*, 39 S.Ct. 426. The claim involved in *Richmond Screw* was an unliquidated claim, acquired by plaintiff on March 7, 1921, involving infringements occurring on January 1, 1919. Because the

court concluded that the literal wording of the 1918 amendment limited plaintiff's recovery exclusively against the United States, it reasoned that the amendment could not be literally applied because to do so would give rise to a serious question of its constitutionality. Because of the exclusivity of the remedy and because "unliquidated" claims against the United States could not validly be assigned, plaintiff was without remedy, if the text of the amendment was literally applied. The court then rationalized as follows: (48 S.Ct. at P. 197)

> "This result, if Section 3477 Revised Statute applies and avoids the assignment would seem to raise a serious question as to the constitutionality of the act of 1918 under the Fifth Amendment to the Federal Constitution. We presume that congress in the passage of the act of 1918 intended to secure to the owner of the patent *the exact equivalent* of what it was taking away from him. It was taking away his assignable claims against the contractor for the latter's infringement of his patent. The assignability of such claims was an important element in their value and a matter to be taken into account in providing for their just equivalent.

Thus there arose the constitutional principle of "the exact equivalent" where government takes away from a *private citizen* his lawful claim for damage to his property by another private citizen. The court stated the context of that principle in these words: (48 S.Ct. at P. 197)

> "Congress exercised the power to take away the right of the owner of the patent to recover from the contractor for infringement. This is not a case of a mere declared immunity of the government from liability for its own torts. *It is an attempt to take away from a private citizen his lawful claim for damage to his property by another private person, which but for this act he would have against the private wrongdoer.*"

Thus, *Richmond Screw* teaches that all material aspects of a private person's claim against another private person falls under the protective egis of constitutional liberty and Congress is without power to destroy such rights without providing for their "exact equivalent". Petitioners' right to trial by jury of their claim against Merrill-National Laboratories, secured by both State and Federal law, was an integral and inseparable part of their claim or suit at common law against Merrill and as such inextricably included in any "exact equivalent" or quid pro quo, to which constitutionally they are entitled upon the occurrence of any congressional divestiture of their claims against Merrill. In its apparent haste to enact the Swine Flu Act, Congress ignored petitioners' jury trial right. On the contrary, it specifically denied petitioners of this right. In so doing, however, the Swine Flu Act violates petitioners' right of due process secured by the Fifth Amendment.

The District Court cited in its ruling *Carr v. United States*, 422 F.2d 1007 (4th Cir., 1970) in an effort to distinguish the constitutional impact of *Richmond*

Screw. It is respectfully submitted that the court's reliance on *Carr* to distinguish *Richmond Screw* is misplaced. *Carr* is fundamentally distinguishable and thus not applicable. In the first place *Carr* dealt with public employees as distinguished from private citizens. The case involved the claim of one public employee against another public employee. Moreover the Federal Driver's Act in controversy involved a surrender of governmental immunity for the wrongful acts of its public employees while acting within the course and scope of their employment by government. Even before the enactment of this legislation, the United States was burdened with potential vicarious liability for the wrongful acts of its employees. Thus, the cause of action against the United States was extant at all times before the adoption of the Federal Driver's Act. The enactment of that legislation simply lifted the bar of immunity so as to permit enforcement against government of that existing cause of action. Not so in petitioners' case. There never existed any legal connexity between petitioners and the United States as to petitioners' cause of action against Merrill-National Laboratories. The United States was a total stranger to petitioners' legal right against Merrill. This fundamental distinction makes *Carr* inapplicable.

Moreover, the court in *Carr* found that a quid pro quo existed and thus constitutional requirements were fulfilled. As to this the court observed: (422 F.2d at P. 1011)

> "Even assuming that the Tort Claims Act is not available, the Driver's Act is itself an ade-

> *quate quid pro quo* for it provides Carr with valuable protection against personal liability for on the job automobile accidents for which he might have been responsible."

The District Court cited the following language from the *Carr* decision as dispositive of petitioners' reliance on *Richmond Screw*:

> "There the Supreme Court dealt with statutes whose combined effect deprived a patent owner of his right to sue for infringement. But the patent in that case had been issued prior to the enactment of the relevant legislation. There was, therefore, a vested right in being which was sought to be abrogated." (422 F.2d at 1010-11)

The District Court's conclusion that this language disposes of petitioners' claim is wrong for two substantial reasons: (a) The quoted language from *Carr* instances a misreading of *Richmond Screw*, and (b) If the quoted language is a correct analysis of the holding of *Richmond Screw*, then *Carr* sustains petitioners' position.

The patent in *Richmond Screw* did not constitute the plaintiff's cause of action. His cause of action was the wrongful action of government in infringing his patent. And this act occurred *after* the enactment of the legislation involved. Thus, the patent did not create a vested cause of action in *Richmond Screw*. The patent simply created in *Richmond Screw* inalienable inchoate rights. And such inchoate rights were considered by the court in *Richmond Screw* as constituting property interest that could not be divested except by due process.

Petitioners also were invested with similar inchoate rights before the enactment of the Swine Flu Act by virtue of the provisions of Louisiana Civil Code, Article 2315. The subsequent wrongful conduct of Merrill resulting in injury to petitioners is of the same essential, basic, nature as the subsequent wrongful action of government in infringing the patents as was involved in *Richmond Screw*. Therefore, if plaintiff in *Richmond Screw* had a vested interest of constitutional dimension resulting from the patents, then necessarily petitioners' vested interest resulting from Louisiana Civil Code, Article 2315 is of the same constitutional dimension. Petitioners' claim as asserted in their lawsuit therefore cannot be taken from them without offending constitutional due process. To the extent that the Swine Flu Act deprives petitioners of such rights, it is unconstitutional. Defendant's motions were therefore improperly sustained.

(b) The Swine Flu Act Denies Petitioners of Trial By Jury in Violation of the Seventh Amendment

In *Oregon v. Mitchell*, 91 S.Ct. 260, 267 (1970) the court stated:

> "Congress has no power under the enforcement sections to undercut the amendment's guarantees of personal equality and freedom from discrimination * * * or to undermine

> those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the states."

Congress, by the enactment of the Swine Flu Act, in remitting petitioners, and those similarly situated, to the administrative procedures established by the Federal Tort Claims Act, has done precisely that which *Oregon* says is proscribed, i.e., it has denied petitioners of their Seventh Amendment right to jury trial. Of all the personal freedom guarantees, trial by jury ranks very high in the catalog of constitutional safeguards. *U.S. ex rel Toth v. Quarles*, 350 U.S. 11, 76 S.Ct. 1, and the federal policy favoring jury trials is of historic and continuing strength. *Simler v. Conner*, 372 U.S. 221, 83 S.Ct. 609. The people's demand for it is not an afterthought of recent origin. As Mr. Justice Story observed in *Parsons v. Bedford*, 28 U.S. 433; 3 Pet. at P. 446: "One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress. * * * The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

The national jurisprudence indicates quite convincingly a national commitment to trial by jury that is unparalleled in its consistency, its ancestrial roots, its pervasive character and its unswerving attachment. Any congressional act in derogation of such a

profound right must be narrowly construed to avoid offending the guaranty of the Seventh Amendment. The Federal Tort Claims Act, to which the Swine Flu Act remits the person injured through the negligence of the manufacturer as alleged in the Ducharmes' lawsuit, only once has been the subject of constitutional assessment. *Glasspool v. United States*, 190 F.Supp. 804. The court denied jury trial on two grounds:

The government's right to place conditions on a cause of action which results from a relaxation of the sovereign immunity doctrine and the inapplicability of the Seventh Amendment to the cause of action created. Regarding the first ground, the court stated: (190 F.Supp. 806)

> "It is also true that all the cases and all the authorities agree that where a sovereign waives its immunity from suit, it may attach thereto any limitation or condition that it choose to attach . . . . [T]he waiver of immunity is a matter of grace rather than of compulsion and rights accrued under the waiver are matters of grace rather than right."

Regarding the second ground, the court stated: (190 F.Supp. at P. 807)

> "The Seventh Amendment provides for the preservation of a jury trial in suits at common law — at common law there is no right of action against a sovereign enforceable by a jury trial or otherwise. The Seventh Amendment simply preserves the rights as existing at

common law but does not create rights where none existed."

Neither rationale justifies denial of the constitutional right of petitioners to a jury trial in this case. Ducharmes' cause of action involves neither a sovereign immunity question nor a cause of action created by the Swine Flu Act. The United States is neither directly nor vicariously liable for the wrongful conduct of the manufacturer. The United States, by the enactment of the Swine Flu Act, simply *voluntarily* interposed itself and *gratuitously assumed* the liability of a tort feasor whose wrongful conduct injured plaintiffs. As the Supreme Court observed in *Richmond Screw* "this is not a case of a mere declared immunity of the government from liability of *its own torts*".

The government is simply assuming the torts of a private citizen. Petitioners' claim is a standard tort "suit at common law" which exists independently of any federal statute and which is therefore covered by the Seventh Amendment. Moreover, the Swine Flu Act does not relinquish any governmental immunity with regard to the damage claimed. The basic claim is against the manufacturer, not the government, and a private party has no immunity from liability for damages in a tort action. As the Supreme Court held in *Wm. Cramp & Sons v. International C.M.T. Company*, 38 S.Ct. 271, 274:

> "A contractor with the United States, therefore, is in the very nature of things bound to discharge the obligation of his contract

> without violating the rights of others, and merely because he contracts with the United States is not vested with the power to take the property of others upon the assumption that as a result of the contract with the United States he enjoys the right to exercise public and governmental powers possessed by the United States."

The government merely substituted itself for the usual defendant at common law and therefore had no right to enforce limitations on the injured person's use of the common law cause of action. This is a crucial distinction which Congress evidently failed to recognize in its haste to enact the legislation. To hold nonetheless that sovereign immunity is involved and bars jury trial is to adopt a cavalier treatment of the Seventh Amendment neither historically nor constitutionally permissible. A brief review of the workings of the federal judiciary in the application of the Seventh Amendment supports this conclusion.

Whitehead v. Shattuck, 11 S.Ct. 276 (1891) is instructive. *Whitehead* involved a suit in equity to quiet title. Defendant filed a motion to dismiss, the thrust of which was that plaintiff had an adequate remedy at law and therefore could not invoke the equity jurisdiction because to do so would permit a subversion of defendant's Seventh Amendment right to jury trial. The Supreme Court agreed and held that such a procedure would result in such a circumvention because by proceeding in equity jury trial in suits at common law "would be defeated if an action at law could be tried by a court of equity as in the latter court

a jury can only be summoned at its discretion, to ascertain special facts for its enlightenment * * * and so it has been held by this court 'that whenever a court of law is competent to take cognizance of a right and has power to proceed with a judgment which affords a plain, adequate and complete remedy without the aid of the court of equity the plaintiff must proceed at law because the defendant has a constitutional right to a trial by jury * * * but this may be said, that where an action is simply for the recovery and possession of specific, real or personal property, or for the recovery of a *money judgment*, the action is one at law. An action for the recovery of real property including damages for withholding it has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain property; the remedy which he wishes to obtain is its possession and enjoyment; and, in a contest over the title, both parties have a constitutional right to call for a jury'."

Whitehead was followed by *Hepner v. United States*, 29 S.Ct. 474 (1909). This was a civil suit by the United States to recover a penalty incurred for inducing an alien to migrate to the United States for the purpose of performing labor in violation of federal law. The trial court directed the verdict in favor of the United States. The defendant contended that the directed verdict procedure had the effect of denying jury trial. The court sustained the directed verdict, but in the course of the opinion, expressly held that, even in a suit instituted by the United States, "the defendant was, of course, entitled to have a jury summoned in this case" (29 S.Ct. at P. 479).

Hepner was followed by *United States v. Regan*, 34 S.Ct. 213 (1914). This also involved a suit by the United States to collect a penalty for violation of the alien immigration act. The court again reiterated its earlier holding that even where the United States is a party-plaintiff, where the action is a civil action of debt involving more than Twenty Dollars, "jury trial is demandable" (34 S.Ct. P. 217).

Ross v. Bernard, 90 S.Ct. 733 (1970) is eminently applicable to plaintiffs' position. *Ross* involved a derivative action filed by stockholders on behalf of a corporation against corporate officials. The question was whether such a derivative action was triable to a jury and protected by the Seventh Amendment. The defendants contended that the action was essentially an equitable action and therefore not one contemplated by the Seventh Amendment. In holding that the Seventh Amendment applied the court, adverting to *Parson v. Bedford* held: (90 S.Ct. at P. 735)

> "The Seventh Amendment preserves to litigants the right to jury trial in suits at common law — 'not merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. * * * In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may

assume to settle legal rights.' Parsons v. Bedford, Breedlove & Robeson, 3 Pet. 433, 447, 7 L.Ed. 732 (1830).

* * *

"* * * The Seventh Amendment, for example, entitled the parties to a jury trial in actions for damages to a person or property, for libel and slander, for recovery of land, or for conversion of personal property. * * *"

After reviewing the jurisprudence and having discussed some of the cases, the court further said: (90 S.Ct. at P. 738)

"Beacon and Dairy Queen presaged DePinto. Under those cases, where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims. The Seventh Amendment question depends on *the nature of the issue to be tried* rather than the character of the overall action. See Simler v. Conner, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691, (1963). The principle of these cases bears heavily on derivative actions." (Emphasis added)

The court also approvingly cited *Fleitmann v. Welsback Street Lighting Co.*, 36 S.Ct. 233. That case held that the triple damage claim under the anti-trust law was one as to which jury trial was demandable.

The United States is a "derivative" defendant in petitioners' lawsuit. It voluntarily assumed this derivative status. Petitioners claim against the manufacturer is rooted in Louisiana Civil Code Article 2315 and is a suit at common law within the contemplation of the Seventh Amendment. Applying the rationale of *Ross*, petitioners' right to jury trial secured by the Seventh Amendment against the manufacturer equally obtains against the derivative defendant, i.e., the United States. The United States voluntarily assumed the manufacturer's liability. The Swine Flu Act did not create petitioners' cause of action. The congressional provision providing the substitution mechanism cannot be given the effect of altering petitioners' Seventh Amendment Remedy as to a suit at common law. To the extent that the Swine Flu Act attempts to deny petitioners of jury trial, it violates the Seventh Amendment and is therefore to that extent unconstitutional.

Pernell v. Southall Realty, 94 S.Ct. 1723 (1974) is another case in point. As the court stated "the question presented in this case is whether the Seventh Amendment guarantees the right to trial by jury in an action brought in the District of Columbia for the recovery of possession of real property". Defendant was denied trial by jury based on the contention that an ejectment action was not a suit at common law and therefore not within the contemplation of the Seventh Amendment.

In reversing the Court held that "in a just sense, the (Seventh) Amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form

which they may assume to settle legal rights" (94 S.Ct. at P. 1729).

To the complaint that jury trial in such cases would be a burden upon the court and would be in conflict with efforts to expedite judicial disposition of such controversy, the court observed that this was not necessarily so but then made the following statement: (94 S.Ct. at P. 1734)

> "* * * More importantly, however, we reject the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial. * * *
>
> * * *
>
> "* * * Some delay, of course, is inherent in any fair-minded system of justice. A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home."

Curtis v. Loether, 94 S.Ct. 1005 significantly expands the compass of the Seventh Amendment and includes within its reach an action under the Civil Rights Act of 1968 (42 U.S.C. 3612). The court observed, furthermore, that the Seventh Amendment is generally inapplicable in administrative proceedings but only "where jury trials would be incompatible with the whole concept of administrative adjudication" (94

S.Ct. at P. 1008). And in a footnote the court explains: "The concept of expertise on which the administrative agency rests is not consistent with the use by it of a jury as fact finder".

No particular administrative technical expertise is necessary to determine the appropriate damage award for personal injury in the instant case. In fact, the jury has long been considered the appropriate institution for determining liability and damage awards in tort cases. Therefore, the mandatory administrative determination under the Swine Flu Act does not fulfill the recognized purpose for such proceedings and seems wholly at odds with the traditional use of a jury trial in tort cases. In the instant case, the government improperly employs the administrative process for convenience rather than technical expertise.

Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Commission, 97 S.Ct. 1261 (1977) appears to be the latest expression of the Supreme Court as to the applicability and contour of the Seventh Amendment. This decision instances a comprehensive review of the origin, development and application of the Seventh Amendment. The court had under consideration whether or not the imposition of penalty by an administrative agency was subject to jury trial. The court held that jury trial was not compelled by the Seventh Amendment because the legislation dealt with "public rights" and these were described as "cases in which the government sues in its sovereign capacity to enforce public rights created by statute within the power of Congress to enact — the Seventh Amendment does not prohibit Congress from

assigning the fact finding function and initial adjudication to an administrative forum with which the jury would be incompatible" (97 S.Ct. at P. 1266). After reviewing prior decisions, the court established the outer perimeter of those prior decisions vis-a-vis the Seventh Amendment. Said the court: (97 S.Ct. at P. 1270)

> "Our prior cases support administrative fact finding in *ONLY* those situations involving 'public rights' e.g. where the government is involved in its sovereign capacity under an otherwise valid statute *creating enforceable public rights. WHOLLY PRIVATE TORT, CONTRACT, PROPERTY AND A VAST RANGE OF OTHER CASES AS WELL ARE NOT AT ALL IMPLICATED.*"

Petitioners' lawsuit involves a "wholly private tort", a claim residing in the very center of the common law. Significantly, in the enactment of the Swine Flu vaccine Congress not once made a determination or even laid claim to the view, that the common law and other existing remedies available to deal with injuries secondary to Swine Flu vaccine were "inadequate" to protect such injured persons. Such a finding is necessary to justify denial of jury trial. Speaking to this, the Supreme Court in *Atlas* stated: (97 S.Ct. at P. 1272)

> "Congress found the common law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the nation's working men and

> women. It created a *new cause of action*, and remedies therefor, *unknown to the common law*, and placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved. The Seventh Amendment is no bar to the *creation of new rights* or to their enforcement outside the regular courts of law."

Thus, when distilled to its bare essence, government's motion to dismiss rests exclusively on the naked substitution mechanism of the Swine Flu Act. Its cry of sovereign immunity on account of any other historically recognizable reason has a hollow ring and is but the shrill screeching of sophistry and rhetorical excesses. Not only is sovereign immunity not involved in this case but the very liability of the United States is not on the line. If petitioners recover in this case, based upon the manufacturer's negligence, then petitioners' claim is not a "meritless" claim, against which the United States sought to protect the manufacturer. And if petitioners prevail, then it means that the manufacturer was guilty of negligence. And if the manufacturer is guilty of negligence, then by the express provisions of the Swine Flu Act the United States is entitled to sue the manufacturer for any damage it might have to pay to petitioner (247(b)(C)(7)). In the end, therefore, the United States loses nothing.

Forasmuch as the substitution mechanism is the only basic premise of government's motion to dismiss, this concept must be closely scrutinized. The substitution process did not strip petitioners' cause of

action of its common law nature; nor did it create a new cause of action; nor did it convert the petitioners' cause of action from a private to a public tort. This legislative substitution simply placed the national government in the shoes of the manufacturer for the purpose of *defending* against petitioners' claim and the claims of similar victims of the manufacturer's negligence or common law tort.

The manufacturer is a private citizen. It allegedly committed a legal wrong, made wrong and cognizable by the laws of Louisiana. Under the laws of Louisiana it is liable to petitioners for the resulting injuries sustained by petitioners. Under the jurisprudence and the Seventh Amendment, petitioners are entitled to trial by jury of the issues presented by their complaint. Now, then, if the United States is "substituted" for the manufacturer, then it is "put in the place of" the manufacturer. And if it is "put in the place of" the manufacturer, then it, too, is liable as a "private person" and the issues of that liability are to be tried to a jury.

The Swine Flu Act does not purport to create "a new cause of action * * * unknown to the common law". The cause of action asserted by petitioners is well known to the common law and is that cause of action contemplated by the Seventh Amendment. Their cause of action is a "wholly private tort". It is beyond the power of Congress to deny petitioners of trial by jury of their "wholly private tort" claim. To the extent that the Swine Flu Act denies petitioners of trial by jury, by purporting to channelize the adjudication of their right through the Federal Torts Claim Act, it violates

the Seventh Amendment and is therefore unenforceable. The motion of the United States Government to dismiss petitioners' lawsuit, therefore, must be rejected.

(c) The Swine Flu Act Denies Equal Protection and Thus Violates the Due Process Concept of the Fifth Amendment

The Swine Flu Act invidiously discriminates against petitioners as claimants and in favor of Merrill-National Laboratories and all other "program participants" as to the Seventh Amendment right to trial by jury. Under Section 247(b)(C)(7), should petitioners obtain judgment against the United States or should their claims be settled with the United States, based upon the negligence of Merrill-National Laboratories, the United States would have the right to file an action against this drug manufacturer in the district court of its residence to recover from it the amount of any payment that it would make to petitioners. In such an action, Merrill-National Laboratories would have the unquestioned and unconditional right to trial by jury. *Hepner v. United States*, 29 S.Ct. 474; *United States v. Regan*, 34 S.Ct. 213. Thus, under the terms of the Swine Flu Act, the wrongdoer, whose tortious action injured petitioners, is granted trial by jury of the very issues involved in that tortious action. On the other hand petitioners, the victims of the wrongdoer's actions, are denied trial by jury of all relevant issues of such tortious action. This disparity of constitutional liberty prevails notwithstanding that there exists no difference which bears a reasonable and just relation to the Swine Flu Act in respect to which this discrimination exists.

Both petitioners and Merrill-National Laboratories are citizens of the United States. Both are entitled to access to the courts, to due process, and to political equality. In any lawsuit filed by the United States against Merrill-National Laboratories in any United States District Court of appropriate jurisdiction there would be involved all of the essential issues involved in petitioners' lawsuit: The nature and extent of petitioners' injuries would be involved, the issues of liability, the standard of negligence involved in petitioners' claim, the laws of Louisiana creating petitioners' claim, the laws of Louisiana defining Merrill-National Laboratories' liability, all would be matters triable to a jury.

Such a discrimination is arbitrary and capricious. There exists no reasonable ground of difference, having a fair and substantial relation to the object of the Swine Flu Act, between petitioners and Merrill-National Laboratories so as to justify the discrimination. To grant jury trial to the wrongdoing program participant, but to deny jury trial to the victim of such a wrongdoing program participant, has nothing whatever to do either with the purpose or the objective of the Swine Flu Act. Such discrimination is not in the least reasonably related to encouraging the participation in the vaccine program of "agencies, organizations, and individuals who will manufacture, distribute and administer the Swine Flu vaccine", or to the objective of preparing "to meet the potential emergency of a swine flu epidemic". If the purpose of substituting the United States as defendant is to have the United States absorb the financial burden of defending to meritless claims, denying jury trial to the vic-

tim of a wrongdoing program participant but granting jury trial to such a wrongdoing participant has absolutely no reasonable relation to such a purpose. Nor does such a discriminatory act encourage insurance companies to extend liability insurance to the program participants. Invidiousness alone supports such treatment difference.

While Congress is not denied the power to "treat different classes of persons in different ways", it is denied power to "legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute". *Reed v. Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253. Congress, in the enactment of the Swine Flu Act, has done precisely that which it had no power to do.

"A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike" *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561. Tested against such a standard of constitutional assessment, the classification created by the Swine Flu Act would be invalid under the equal protection of the Fourteenth Amendment and as such it is also inconsistent with the due process requirement of the Fifth Amendment. *Richardson v. Belcher*, 404 U.S. 78, 92 S.Ct. 254; *Johnson v. Robison*, 94 S.Ct. 1160.

To the extent therefore that the Swine Flu Act denies petitioners jury trial, but grants jury trial as to the same essential issues to the tort-feasor who inflicted injuries and damages on petitioners, it violates the due process concept of the Fifth Amendment and is thus unenforceable. Petitioners, therefore, are entitled to jury trial of their common law claims.

CONCLUSION

It is obvious that the Swine Flu program was ill-conceived and hastily implemented. It is equally obvious that the alleged threat of a Swine Flu epidemic existed as a figment of someone's imagination only. The Swine Flu vaccination program has resulted in a monumental tragedy. Thousands of otherwise healthy citizens have been maimed by permanent paralysis and even death as a result of the administration of this vaccine. The magnitude of that tragedy, however, should not be the building block for the structuring of a legal edifice for the additional destruction of the victim's constitutional liberty. The nature of the issue involved in petitioners' claims is that contemplated by the Seventh Amendment. And if the Seventh Amendment question "depends on the nature of the issue to be tried rather than the character of the overall action" as *Ross* teaches, then petitioners have an undeniable right to jury trial as to their suit at common law. Congress was without constitutional authority to deprive them of this right. Defendants' motions, therefore, were improperly granted. It is respectfully submitted, therefore, that petitioners' writ application should be granted in order to secure them in the exercise of their constitutional liberty.

Respectfully submitted,

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318-233-4625

J. MINOS SIMON

CERTIFICATE OF SERVICE

I, J. Minos Simon, attorney for petitioners in the foregoing application for writ of certiorari to the United States Court of Appeals, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ____ day of September, 1978, I served three copies of the foregoing petition for writ of certiorari on the following:

(1) Jeffrey Axelrad, Chief, Torts Section and Leon B. Taranto, Attorney, Torts Section, Civil Division, United States Department of Justice, Washington, D.C., 20530;

(2) Frederic D. Lamb, Esquire, Vice President and Counsel, Merrill-National Laboratories, Division of Richardson-Merrill, Inc., Cincinnati, Ohio, 45215; and

(3) Edward L. Shaheen, United States Attorney, Post Office Box 33, Shreveport, Louisiana, 71161

by depositing same in the United States Mail, postage prepaid, and properly addressed.

Lafayette, Louisiana, this ____ day of September, 1978.

J. MINOS SIMON

APPENDIX A

Marie and Donald DUCHARME,
Plaintiffs-Appellants,

versus

MERRILL-NATIONAL LABORATORIES, and
United States of America,
Defendants-Appellees.

No. 77-3488

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

June 14, 1978.

Before RONEY, GEE and FAY, Circuit Judges.

PER CURIAM:

We affirm the judgment below on the basis of the district court's memorandum opinion appended.

AFFIRMED.

APPENDIX A-1

APPENDIX

(Title Omitted)

No. 770,452

RULING ON MOTIONS

Plaintiffs filed this diversity action against Merrill-National Laboratories for injuries resulting from an adverse reaction to a swine flu vaccine. The basis of their cause of action is Louisiana Civil Code Article 2315.

The United States filed motions under the Swine Flu Act (42 U.S.C. § 247b) to dismiss for failure to exhaust administrative remedies, to substitute United States as sole defendant and an additional motion to stay discovery pending outcome of hearing on the motions.

Plaintiffs oppose the government motions alleging: (1) the Swine Flu Act is in violation of the due process clause of the 5th and 14th Amendments in that it abrogates plaintiffs' cause of action under Article 2315 for damages against the manufacturer; (2) the Swine Flu Act, which incorporates the Federal Tort Claims Act, violates plaintiffs' right to a jury trial.

Constitutional attacks on the Swine Flu Act, similar to the attack being made here, have been made in at least three district courts.[1]

1 *Wolfe v. Merrill National Laboratories*, 433 F.Supp. 231 (M.D.Tenn.1977); *Sparks v. Wyeth Laboratories, Inc.*, 431 F.Supp. 411 (W.D.Okl.1977); *Stephens v. Wyeth Laboratories, Inc.*, No. 77-L-0274-S (W.D.Ala., June 3, 1977).

The courts, in all three of the above cases, upheld the constitutionality of the Swine Flu Act.

The Swine Flu Act basically:

1. Creates a cause of action against the United States based on negligence, strict liability or breach of warranty for damages arising out of the act of a program participant;[2]

2. provides that the cause of action against the United States arising out of the administration of the swine flu vaccine shall be exclusive of any civil action against the program participant, 42 U.S.C. § 247b(k)(3);

3. incorporates provisions of the Federal Tort Claims Act (42 U.S.C. § 247b(k)(1)(B)) including (a) no right to jury trial (28 U.S.C. § 2402), (b) two year prescription (28 U.S.C. § 2401(b)), and (c) requirement of first exhausting an administrative remedy (28 U.S.C. § 2675); and

4. affords the United States the right to seek indemnity from the program participant on the basis of negligence or breach of contract in connection with the swine flu program. 42 U.S.C. § 247b(k)(7).

The cause of action provided by the Swine Flu Act to an injured person against the United States is substantially the same as that afforded against the manufacturer under Louisiana Civil Code Article 2315 except that under the Swine Flu Act no trial by jury is af-

2 Program participant is defined as a manufacturer or distributor of swine flu vaccine. 42 U.S.C. § 247b(k)(2)(B).

forded and the plaintiff is required to seek first administrative review of his claim.

DUE PROCESS CLAIM

It is well settled that a plaintiff has no vested right in any tort claim for damages under state law. *Keller v. Dravo Corporation*, 441 F.2d 1239 (5th Cir. 1971), upheld the exclusive remedy provision of the Longshoremen's & Harbor Workers' Compensation Act against a due process challenge. The Court in *Keller* noted that the "abolition of non-vested rights is especially innocuous if . . . one remedy is substituted for another." (441 F.2d at 1242). Legislation has even been upheld where no remedy was substituted in place of the cause of action that was taken away. For example, in *Carr v. United States*, 422 F.2d 1007 (4th Cir. 1970), the Court upheld the constitutionality of the Federal Drivers Act (28 U.S.C. § 2679) which abrogated a federal employee's cause of action against a fellow employee. The Court in *Silver v. Silver*, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929) upheld the abolition of a guest passenger's action against the host driver for negligence. In *Brady v. Roosevelt Steamship Co.*, 317 U.S. 575, 63 S.Ct. 425, 87 L.Ed. 471 (1943), the Supreme Court recognized the congressional power to grant immunity from tort liability to private operators of government vessels, and in so doing paved the way for the enactment of the Suits in Admiralty Act, 46 U.S.C. § 745.

Plaintiffs rely on *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 48 S.Ct. 194, 72 L.Ed. 303 (1928) for the proposition that congress may never

validly divest a private litigant of a civil cause of action. The identical argument was made in *Carr v. United States* and disposed of in the following manner:

> "There the Supreme Court dealt with statutes whose combined effect deprived a patent owner of his right to sue for infringement. But the patent in that case had been issued prior to the enactment of the relevant legislation. There was, therefore, a vested right in being which was sought to be abrogated." (422 F.2d at 1010-11)

Plaintiffs' cause of action against the manufacturer did not arise until after passage of the Swine Flu Act. Plaintiffs had no prior vested right in a cause of action under Louisiana Civil Code Article 2315.

TRIAL BY JURY CLAIM

Plaintiffs allege that the Swine Flu Act deprives them of equal protection of the law by allowing the manufacturer a trial by jury of the indemnity claim of the United States but denies trial by jury of their own claim. Plaintiffs contend that they and the manufacturer fall in the same general classification under the Act and they should be treated alike with respect to their right to trial by jury.

While the equal protection clause of the 14th Amendment has no application against the United States, the 5th Amendment does prohibit discrimination that is

"so unjustifiable as to be violate of the due process."[3] In the area of social and economic welfare, in order to meet due process standards the classification created under the statute must be reasonable, not arbitrary and bear some rational relationship to legitimate congressional goals.[4]

I am unable to find that the disparity in treatment between plaintiffs and manufacturer with respect to jury trial is so unrelated to the object of the statute as to be arbitrary.

Congressional purpose is set forth in the Act, 42 U.S.C. § 247b(k)(1)(A):

> "(i) . . . to achieve the participation in the program of the agencies, organizations, and individuals who will manufacture, distribute and administer the swine flu vaccine . . . and to assure the availability of such vaccine in interstate commerce . . .
>
> (ii) . . . to establish an orderly procedure for the prompt and equitable handling of claims . . .
>
> (iii) to be prepared to meet the potential emergency of a swine flu epidemic . . ."

Congress found it necessary to insulate manufacturers from primary liability and provide an ex-

3 *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954).

4 *Richardson v. Belcher*, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971).

clusive remedy against the United States due to the collapse of the commercial liability insurance market. Legislative history reflects that insurance companies refused to insure drug manufacturers for interstate distribution of the vaccine due to the potential for a large number of meritless claims with attendant costs of investigation and defense and recent federal court decisions holding drug manufacturers strictly liable for failure to warn of possible adverse drug effects. While the Swine Flu Act is drafted to provide immunity to manufacturers from primary responsibility, the Act affords the United States the right to indemnity on the bases of negligence and breach of the contractural obligation. For this limited risk to drug manufacturers insurance was available.[5]

The United States also recognized some potential liability due to their "unique role in the initiation, planning, and administration of the swine flu [vaccine]." 42 U.S.C. § 247b(k)(1)(A)(ii). By making a claimant's remedy exclusive against the United States but allowing limited indemnity by United States against the manufacturer, Congress struck a balance between plaintiff's interest in preserving a tort remedy and the manufacturer's interest in obtaining insurance coverage.

Congress is not denied the power to "treat different classes of persons in different ways," but it is denied power to "legislate that different treatment be accorded to persons placed by a statute into different

5 *See Cong.Rec. E 4695-4707*, August 12, 1976. Debate in both chambers appears at *Cong.Rec. H 8643-8655 and S 14108-14122*, August 10, 1976.

classes on the basis of criteria wholly unrelated to the objective of that statute."[6]

I conclude that the procedure established under the Act is rationally related to achieving the goal of assuring interstate distribution of the swine flu vaccine.

Plaintiffs make the additional argument that the Act violates their 7th Amendment right to trial by jury.

Although the 7th Amendment preserves the right to trial by jury of suits at common law, it is settled that suits against the United States, requiring waiver of sovereign immunity, are not "suits at common law" within the meaning of the 7th Amendment. When the sovereign waives immunity it may attach any conditions (including no right to trial by jury) to its consent.[7]

CONCLUSION

I conclude that the Swine Flu Act represents a valid exercise of Congressional power under the Constitution. Accordingly, the motion of the United States to be substituted as sole defendant under the terms of the Act is granted.

The administrative procedure required under the

6 *Reed v. Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253, 30 L.Ed.2d 225 (1971); *Johnson v. Robison*, 415 U.S. 361, 374, 94 S.Ct. 1160, 1169, 39 L.Ed.2d 389 (1974).

7 *Glidden Company v. Zdanok*, 370 U.S. 530, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962); *United States v. Sherwood*, 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); *Nistendirk v. McGee*, 225 F.Supp. 881 (W.D.Mo.1963).

Federal Tort Claims Act is jurisdictional and cannot be waived. *Executive Jet Aviation, Inc. v. United States*, 507 F.2d 508 (6th Cir. 1974). However, under the Swine Flu Act, if a suit is dismissed for failure to file an administrative claim, the plaintiff is given 30 days from the date of dismissal or two years from the date the claim arose in which to file an administrative claim. Therefore, the Government's motion to dismiss without prejudice to plaintiff is granted.

Lafayette, Louisiana, this 1st day of December, 1977.

/s/ W. Eugene Davis
Judge, United States District Court

Filed

Dec. 2, 1977.

Supreme Court, U. S.
FILED
NOV 10 1978
MICHAEL RODAK, JR., CLERK

No. 78-408

In the Supreme Court of the United States

OCTOBER TERM, 1978

MARIE AND DONALD DUCHARME, PETITIONERS

v.

MERRILL-NATIONAL LABORATORIES and
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners argue that the Swine Flu Act, 42 U.S.C. 247b(j)-(*l*), is unconstitutional because it abrogates common law remedies and, by substituting the United States as a defendant, deprives them of a right to a jury trial. The district court rejected these arguments in an opinion on which we largely rely (Pet. App. 2a-9a), and the court of appeals affirmed on the basis of the district court's opinion (Pet. App. 1a).[1]

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[1]Every other court that has considered the question has sustained the constitutionality of the Swine Flu Act. See *Jones* v. *Wyeth Laboratories, Inc.*, Civ. No. 77-2059 (W.D. Ark. Jan. 6, 1978), aff'd, No. 78-1238 (8th Cir. Sept. 20, 1978); *Wolfe* v. *Merrill National Laboratories*, 433 F. Supp. 231 (M.D. Tenn. 1977); *Stephens* v. *Wyeth Laboratories, Inc.*, Civ. No. 77-0274-S (N.D. Ala. June 3, 1977); *Sparks* v. *Wyeth Laboratories, Inc.*, 431 F. Supp. 411 (W.D. Okla. 1977), appeal docketed, No. 77-1409 (10th Cir.).

The Swine Flu Act was designed to make the program of swine flu vaccinations of 1976 possible. Because of the uncertain risks involved in administering the vaccine and defending lawsuits, the potential producers of the vaccine were unable to obtain adequate liability insurance. Congress solved that problem by providing that the United States would be liable for any personal injury or death caused by the program of vaccinations, and that the remedy against the United States would be exclusive. The Act requires adherence to the procedures established for the administration of the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*

Petitioners commenced this action against a manufacturer of swine flu vaccine, and the United States moved to substitute itself as a defendant. It also moved to dismiss the action, because petitioners had not complied with the procedures specified in the Federal Tort Claims Act. The district court granted the motion of the United States and dismissed the action.

Petitioners' argument that the Swine Flu Act violates the Due Process Clause of the Fifth Amendment by abrogating a common law tort and substituting a statutory cause of action is insubstantial. This Court upheld a similar substitution last Term. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, No. 77-262 (June 26, 1978), slip op. 22-32. Here, as in *Duke Power*, a right of action against a private party has been replaced by a right of action against the United States. Here, as in *Duke Power*, the substitute action is roughly equivalent to the common law tort remedy. It preserves a right to full recovery, and the substitution of the United States as the defendant guarantees that any judgment debt will be paid. The Constitution would not be offended by total abolition of a common law right,[2] and so it cannot

[2]See, *e.g.*, *Silver* v. *Silver*, 280 U.S. 117, 122 (1929); *Duke Power*, *supra*, slip op. 26 n.32.

be offended by a change that substitutes one defendant for another.

Petitioners cannot argue, moreover, that any right they enjoyed was abolished by the Swine Flu Act. Petitioner Marie Ducharme received the vaccine only after the statute had been passed and therefore had no vested rights or expectations that any previous legal rule would govern subsequent actions for damages.

Petitioners' further argument that the Swine Flu Act violates the Seventh Amendment—because jury trials are not available in suits against the United States—is frivolous. It is routine for new statutory causes of action to be adjudicated by tribunals in which juries do not sit. See, *e.g.*, *Atlas Roofing Co.* v. *OSHC*, 430 U.S. 442 (1977). Workers' compensation schemes, which replaced common law tort actions, are administered by bodies that do not have juries. And in *Duke Power*, *supra*, the statutory cause of action in the event of nuclear accident was to be administered without a jury. Juries are not required in litigation against the United States, see *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962), and they are therefore unnecessary under the Swine Flu Act.[3]

[3]Petitioners urge that the Act is discriminatory because it provides that manufacturers of vaccine are entitled to a jury trial in case the United States may bring suit to recover the indemnity that is permitted in some instances. See 42 U.S.C. 247b(k)(7). But the difference is justified by a difference in the procedural posture of the parties. In the instant suit the United States is a defendant, and the absence of a jury trial makes the procedures consistent with those under the Tort Claims Act. In a suit for an indemnity, the manufacturer would be the defendant, and the provision for a jury trial in such cases conforms to the norm that private defendants are entitled to jury trials when the United States (or anyone else) is the plaintiff.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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